ARGUMENT

¶16. This case involves the interplay of three statutory schemes: the statutes related to Driving While There is Any Drug Defined in § 13-1401 or its Metabolite in the Person's Body (A.R.S. §§28-1381(A)(3) and (D), the controlled substances statutes (A.R.S. §13-3401, et. al.), and the statutes enacted pursuant to the Arizona Medical Marijuana Act (AMMA) (A.R.S. §36-2801, et. al.).

¶17. The AMMA was passed by the voters to create a narrow exception to the crimes of criminal possession of marijuana by allowing for the "medical use" of marijuana. The statutes controlling driving motor vehicles, including the prohibition under A.R.S. §28-1381(A)(3) of driving with controlled substances or their metabolites , were not changed or amended by the AMMA. The AMMA did state, however, in A.R.S. §36-2802(D) that the medical use of marijuana did not excuse DUI while impaired (under A.R.S. §28-1381(A)(1)).

¶18. A.R.S. § 28-1381(D) provides an affirmative defense to prosecution under the driving with a controlled substance statute, A.R.S. §28-1381(A)(3). This allows a defendant who has a drug or metabolite, listed in A.R.S. § 13-3401 to be found not guilty of the (A)(3) charge if the defendant can demonstrate, by a preponderance of the evidence, that he or she was taking the drug "as prescribed." *State v. Bayardi* (*Fannin*, Real Party in Interest) 230 Ariz. 195, 281 P.3d 1063 (App. 2012). The Petitioner is now trying to expand the AMMA to make

possession of a medical marijuana card and use of "medical marijuana" the equivalent of taking a drug "as prescribed" in A.R.S. §28-1381(D). That is a task that should be left to the legislature and not to the courts.

¶19. The Petitioner's arguments fall under two broad categories. He argues that "medical use" of marijuana applies to DUI "driving" statutes and that medical marijuana qualifies as a prescribed drug under the affirmative defense in A.R.S. §28-1381(D).

I. The Respondent Judge did not abuse his discretion in sustaining the ruling of the lower court that a medical marijuana card is not an affirmative defense to A.R.S. §28-1381(A)(3).

¶20. The State's Motion in Limine requested the trial court preclude the defense from "presenting issues related to the [Petitioner's] medical marijuana card and any statements relating to marijuana as medicine or illness or injury necessitating the use of marijuana." (Pet. App. Ex. 3, p. 6). The trial court declined to extend the AMMA to add medical marijuana to the prescription drug affirmative defense contained in A.R.S. §28-1381(D), finding that such was the province of the legislature and not the courts.

A. <u>The Apache Junction Court ruling.</u>

¶21. The State's Motion in Limine urged the trial court to exclude the introduction of Petitioner's medical marijuana card under Rules of Evidence, Rule 401 and 403. (Pet. App. Ex. 3, p. 5). The trial court held that A.R.S. §36-2802(D)

of the AMMA addressed the use of medical marijuana as it pertained to §28-1381(A)(1) [impaired] but not §28-1381(A)(3) [per se]. The trial court found that A.R.S. §36-2802(E)[2] provided that one can be prosecuted for using marijuana except as authorized in that chapter and "nowhere in that chapter does it address §28-1381(A)(3)." Furthermore, the trial court noted that the legislature was presumptively "aware of the interaction between the medical marijuana laws and the DUI laws because they included §36-2802(D) when they implemented this proposition." The trial court found that A.R.S. §28-1381(D) did not mention "written certifications" and that §28-1381(A)(3)[3] is "not mentioned in the medical marijuana law." The trial court held that the legislature "did not mean to include §28-1381(A)(3) in the exception to the marijuana laws" and granted the State's Motion in Limine. (Pet. App. Ex. 5). The trial court essentially held that introducing the medical marijuana card would be contrary to the intent of both the AMMA and the DUI laws and as such would not be relevant and would confuse and mislead the jury.

B. The Superior Court ruling.

¶22. At the Superior Court, the Respondent Judge heard argument of counsel and issued a written minute entry sustaining the rulings of the trial court. (St. App.

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[2] Although the trial court said §**26**-2802(E), it is clear from the context that it actually meant §**36**-2802(E).

[3] The trial court said §28-13**18(3),** but it is clear from the context it meant §28-13**81(A)(3)**.

Ex 2). After hearing oral argument, the Respondent Judge stated, "I think [the trial court] is right in [its] decision, or at least I think it's within the discretion that [it] has the authority to exercise." (Pet. App. Ex. 7, p. 36, ln 7-9). Referring to the State's motion to preclude the medical marijuana card defense, the Respondent judge stated: "... I think [the trial court's ruling] will stand up ... because **I don't think it's abuse of discretion to keep that defense out because the legislature didn't include it**, in my opinion, and I think [its] because I think that's the conclusion [the trial court] drew." (Appendix Exh. 7, p. 36, ln 22- p. 37 ln 1; emphasis added).

¶23. The Petitioner has merely reargued the points that were rejected by the trial court, and reviewed by the Respondent Judge. The Petitioner has failed to establish that the Respondent Judge abused his discretion in upholding the trial court order.

II. The "medical use" of marijuana under the AMMA is not the same as "driving" under the A.R.S. § 28-1381(A)(3) statute

¶24. The first area of the Petitioner's arguments inaccurately attempts to link the phrase "use" as contained in the AMMA with the drive or be in actual physical control of a vehicle crime under A.R.S. § 28-1381(A)(3). The argument is simply inapplicable as he is facing a driving offense, as opposed to a a criminal charge of personal possession and use of marijuana.

A. The full context of A.R.S. §36-2811(B) shows it is only an affirmative defense to criminal possession of marijuana.

¶25. The Petitioner asserts that A.R.S. §36-2811(B)(1) is an affirmative defense to the driving offense of A.R.S. § 28-1381(A)(3). For support, he quotes the portion of subsection (1) which states that a "registered qualifying patient" is not subject to prosecution in any manner for the "patient's medical **use** of marijuana pursuant to this chapter …" (Petition, p. 10-11 ¶23-24, emphasis added). Remarkably, the Petitioner only quotes from the first half of subsection (1). The entire subsection clarifies that the context of the phrase "not being subject to … prosecution in any manner" means not being subject to arrest or prosecution for possession of marijuana and has nothing to do with a criminal traffic offence. In its entirety, A.R.S. §36-2811(B)(1) states:

> **B.** A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau:
>
> 1. For the registered qualifying patient's medical **use** of marijuana pursuant to this chapter, if the registered qualifying patient does not **possess** more than the allowable amount of marijuana.

(Emphasis added.)

¶26. The plain language of the statute, contrary to the Petitioner's assertion, is that A.R.S. §36-2811(B) only protects a "patient" who is found in possession of not more than the allowable amount of marijuana from criminal prosecution for

drug possession and not from prosecution for traffic offenses like DUI. It likewise clarified that the statute is concerned with the "use" of marijuana. The State does not prosecute for possession or use of marijuana under A.R.S. §28-1381(A)(3). It is only when the person drives a vehicle with marijuana or its metabolite in one's system that A.R.S. §28-1381(A)(3) applies. A.R.S. §36-2811(B)(1) simply does not apply to this case.

B. The legal doctrine of *expressio unis* indicates A.R.S. §36-2811 does not apply to driving with a controlled substance or its metabolite in one's body.

¶27. A.R.S. §36-2811, via subsections (A) through (I), meticulously lays out the presumptions and protections afforded by the statute. Noticeably absent is driving with a controlled substance or its metabolite in one's system or any driving offense or activity. It is basic statutory construction that the expression of one or more items of a class in a statue indicates a clear intent to exclude all items of the same class which are not expressed. *Pima County v. Heinfeld,* 134 Ariz. 133, 654 P.2d 281 (1982). The statute simply provides no protection to the petitioner in this driving case.

C. Preamble does not include "driving" as either a medical or nonmedical use.

¶28. The Petitioner refers to the preamble of the AMMA (Pet. App. Ex 12, p. 2, found at the end of A.R.S. §36-2801) for authority for his proposition that the medical use of marijuana excuses criminal prosecution for a driving offense.

(Petition, p. 12 ¶26-27). The preamble emphasizes a distinction between nonmedical and medical uses of marijuana and makes it clear that only the "medical use" of marijuana protects a person from criminal prosecution.

D. "Driving" is not included in definition of "medical use".

¶29. Additionally, the Petitioner misconstrues the phrase "medical use" in A.R.S. §36-2811(B) by equating it to "driving". (Petition, p. 10, ¶23). The AMMA definition of "medical use", does not include "driving" as an appropriate use. "Medical use" is defined in A.R.S. §36-2801(9) as:

> 9. "Medical use" means the acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition.

E. The AMMA presumption applies to "medical use" of marijuana, not to driving.

¶30. Petitioner erroneously tries to apply the presumption found in A.R.S. §36-2811(A) to this "driving" case by asserting that the Petitioner was a qualifying patient engaged in the "medical use" of marijuana because he had his medical marijuana card with him when he was stopped (Petition, p. 12 - 13 ¶28-29).

¶31. However, the Petitioner does not qualify for the presumption because, although he possessed his registry identification card, he does not meet the other

element of the presumption – he was not found in possession of any marijuana. He was found driving with an active metabolite of marijuana in his system.

¶32. Additionally, the presumption requires the "medical use" of marijuana and the definition of "medical use" (above) does not list "driving" with an active marijuana metabolite in one's system as one of the activities necessary for "the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition." The presumption applies when a qualifying patient is being charged with illegal possession of marijuana and not when he is being charged with a driving offense. AMMA serves only to decriminalize the possession or use of marijuana – but is silent as to driving.

¶33. The Petitioner argues the substance called medical marijuana should be part of the affirmative defense under A.R.S. §28-1381(D) because A.R.S. §36-2813(C) states that medical marijuana is "to be treated just like any other prescription drug" (Petition, p. 14, ¶30). The Petitioner urges that the statute supports his assertion that an AMMA certificate "is to be treated just like a prescription" and therefore having marijuana metabolite falls under the prescription exception in subsection A.R.S. §28-1381(D). (Petition, p. 15, ¶33). The plain language of A.R.S. §36-2813(C) shows that the subsection was not

written to protect marijuana users from "driving" violations but instead was to secure access to "medical care". A.R.S. §36-2813(C) states:

> **C.** For the purposes of medical care, including organ transplants, a registered qualifying patient's authorized use of marijuana must be considered the equivalent of the use of any other medication under the direction of a physician and does not constitute the use of an illicit substance or otherwise disqualify a registered qualifying patient from medical care.

The statute does not say for the purpose of "driving with a controlled substance or its metabolite in one's system or any DUI offense" the authorized use of marijuana is "considered the equivalent of the use of any other medication". The stated purpose of the statute is to allow medical marijuana users to receive "organ transplants" and other "medical care" just like users of "any other medication under the direction of a physician". The exception is to ensure medical professionals will not disqualify a card holder from medical care (such as a transplant). Driving with marijuana metabolite in one's system is not a "purpose of medical care."

F. Only the use of marijuana as authorized by AMMA is decriminalized.

¶34. The AMMA decriminalizes the use of marijuana and prohibits criminal prosecution for its possession in Arizona courts for those qualified patients that scrupulously follow its requirements. *State v. Fields* (*Chase*, Real Party in Interest) 660 Ariz. Adv. Rep. 28 (App. 2013). The AMMA touches on marijuana "use" and "driving" in A.R.S. §36-2802(D) and clearly prohibits driving while

"under the influence" of marijuana. Petitioner's seeks total immunity from the "driving" A.R.S. § 28-1381(A)(3) law as long as there is no impairment and the metabolites come from the "medical use" of marijuana under the AMMA. (Petition, p.16 ¶34-35) There is no provision under the AMMA which authorizes a person to drive with marijuana metabolites in one's body and A.R.S. §36-2802(D) specifically states that unless such "use" is authorized by the AMMA then the AMMA does not prevent the imposition of criminal penalties. A.R.S. §36-2802(D) states:

> This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct:
>
> E. Using marijuana except as authorized under this chapter.

Under the express terms of the AMMA, it was not an authorized "use" for Petitioner to "drive" with "medical marijuana" active metabolite in his body.

G. The Petitioner presents facts not before the lower courts.

¶35. Finally, the Petitioner supplements the record with the following alleged facts that was not before the trial court: 1) the quantity and quality of metabolites found ("small amount" "active THC" "inactive THC"); and 2) that he obtained his medical marijuana from a licensed dispensary (Petition, p. 12 ¶27). Because none of these facts were before the lower courts, this court should not consider them.

¶36. In conclusion, the AMMA decriminalizes "medical use" of marijuana. Neither the preamble to the AMMA (§36-2801), the definition of medical use (§36-2801(9)), the "presumption" (§36-2811(A)), the medical care exception (§36-2813(C)), or the "affirmative defense" (§36-2811(B)) refer to nor apply to "driving" with marijuana metabolite in one's body. There is no ambiguity between the AMMA and the DUI statutes. The AMMA decriminalizes the "medical use" of marijuana while the DUI statutes prosecute "driving" conduct (including driving with a marijuana metabolite in one's system).

III. A "prescription" is statutorily defined and is significantly different than a "written certification" under the AMMA.

¶37. The Petitioner next argues that a medical marijuana card is an affirmative defense to A.R.S. § 28-1381(A)(3) because medical marijuana qualifies as a prescription under the affirmative defense in A.R.S. §28-1381(D). Although the Petitioner lists a smorgasbord of arguments in support of this assertion, none support his claim.

¶38. The Petitioner is charged with having an active metabolite of a controlled substance in his system in violation of A.R.S. §28-1381(A)(3). Arizona law provides an affirmative defense to prosecution on the (A)(3) charge for persons who have metabolites of legally prescribed drugs in their system. A.R.S. §28-1381(D) states:

> D. A person using a drug **as prescribed** by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section.

(Emphasis added.)

¶39. The Petitioner attempts to qualify himself under this DUI exception by equating a "written certification" under the AMMA with a prescription issued by licensed medical practitioners under A.R.S. §28-1381(D). (Petition, p.7, ¶36). The difference between a "prescription" and an AMMA "written certification" is much more than mere "semantics". (Petition, p. 18).

¶40. This Court has held that A.R.S. §28-1381(D) is an affirmative defense to A.R.S. §28-1381(A)(3) only if a defendant can "prove by a preponderance of the evidence that he used **prescription drugs as prescribed** by a licensed medical practitioner." *State v. Bayardi*, 230 Ariz. 195, 201 ¶23, 281 P.3d 1063, 1069 (App., 2012) (emphasis in bold added)

A. Requirements of a prescription are clearly defined by Arizona law.

¶41. The Petitioner argues that the word "prescribed" in the DUI subsection (D) is a term that can be defined by the Oxford dictionary. (Petition, p. 17, ¶36).

¶42. Contrary to the Petitioner's unsupported contention, to obtain a "drug as prescribed by a medical practitioner" a person must obtain a "prescription" as defined by statute and not as it is defined in a dictionary. A "prescription" means a